Alco Iron & Metal Company and Industrial Iron & Metal Processing Workers, Local Union 1088, AFL-CIO, Petitioner. Case 32-RC-1704

29 March 1984

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

By Chairman Dotson and Members Hunter and Dennis

Pursuant to a Stipulation for Certification Upon Consent Election approved 15 September 1982, an election by secret ballot was conducted 30 September 1982 under the direction and supervision of the Regional Director for Region 32 among the employees in the stipulated unit. At the conclusion of the election the parties were furnished a tally of ballots which showed that, of approximately 18 eligible voters, 12 cast ballots for and 4 cast ballots against the Petitioner, and 1 ballot was challenged. The challenged ballot was insufficient to affect the outcome of the election. On 7 October 1982 the Employer filed timely objections to conduct affecting the results of the election, a copy of which was served on the Petitioner.

In accordance with Section 102.69 of the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and, on 14 February 1983, issued and served on the parties his Report and Recommendation on Objections and Notice of Hearing wherein he concluded that the objections raised substantial and material issues of fact which could best be resolved by a hearing, and ordered that a hearing be held to resolve the issues raised by the objections.

A hearing was held before Hearing Officer Jeffrey C. Ewing and on 6 April 1983 the hearing officer issued and served on the parties his Report on Objections. Upon a consideration of the evidence presented, the hearing officer found that the Employer's objections lacked merit and recommended that they be overruled, and that the Petitioner be certified as the bargaining representative of the employees in the stipulated unit.

Thereafter the Employer filed timely exceptions to the hearing officer's report on objections and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

- 3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
- 4. The parties stipulated, and we find, that all full-time and regular part-time employees, including forklift operators, truckdrivers, metal sorters, laborers, burners, welders, stock clerks, and inventory clerks, employed by the Employer at its facility located at 2350 Davis Street, San Leandro, California, but excluding all office clerical employees, guards and supervisors as defined in the National Labor Relations Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The Board has considered the entire record in the case, including the hearing officer's report and the exceptions and brief, and hereby makes the following findings.¹

As noted, the Region conducted an election at the Employer's facility on 30 September 1982. Of the approximately 18 employees eligible to vote, approximately 14 were of Mexican origin. All 14 of these employees spoke Spanish, but only 4 or 5 of them also spoke English.

At the preelection conference immediately prior to the election, the Board agent, who spoke no Spanish, explained general voting procedures. Ron Kantor, who also spoke no Spanish, was present as the Employer's observer. Jose Diaz, a bilingual employee, was the Petitioner's observer. Although the election notices and ballots were in both English and Spanish, no instructions were given on voting procedures to be used for Spanish-speaking employees.

The first or second employee to vote at the election was a Spanish-speaking employee. The Board agent handed him a ballot and explained voting procedures to him in English. When the employee did not understand the instructions, the Board agent asked both Diaz and Kantor whether either could speak Spanish and explain to the voter what to do with the ballot. Diaz stated that he could, and the Board agent asked him, "[W]ould you translate the procedure of voting to these employees?" Diaz spoke in Spanish to the employee, who then voted.

Of the next 12 voters, Diaz initiated conversations in Spanish with 8 or 10 of them, the conversations generally ranging in duration from 30 seconds to 1-1/2 mintues, with one conversation last-

¹ In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Employer's Objections 1, 2, and 3.

ing approximately 2 minutes. The Board agent did not participate or speak to any of these voters, but merely handed them a ballot after Diaz finished speaking. Kantor then complained to the Board agent that Diaz' conversations were too lengthy, that the Board agent should explain voting procedures to Diaz, and that Diaz should interpret the Board agent's words to each individual voter. The Board agent then instructed Diaz to repeat her instructions in Spanish. Five to seven employees voted under this arrangement, each conversation lasting approximately 15 to 20 seconds.

Several employees also encountered various difficulties in casting their ballots. Kantor testified about several incidents, including one in which an employee failed to close the curtain of the voting booth, one in which an employee was unable to locate the pencil inside the voting booth, one instance when an employee needed additional instructions, and two instances where an employee had to be shown where the ballot box was. As noted above, the Petitioner received a majority of the ballots cast.

The hearing officer found no basis for concluding that the Board agent's conduct or Diaz' activity compromised the neutrality of the Board or indicated to voters that the Board supported the Petitioner. The hearing officer found that Diaz' conduct was for a proper purpose and rendered a necessary service. He found that it was fortunate that Diaz was available to translate voting procedures, and that even if his explanations may have been lengthy and too verbose, there was no indication that he did anything more than explain voting procedures to employees who might not otherwise have been able to exercise their rights. Finally, the hearing officer found that the alleged confusion about voting procedures was typical and did not differ from the normal routine at elections. The hearing officer concluded therefore that the Employer had not demonstrated that the election failed to reflect the true sentiments of the voters.

Contrary to the hearing officer, the Employer contends that the Regional Director did not conduct the election with due regard to the language limitations of a significant number of those in the election unit. The Employer alleges, inter alia, that although the Regional Director knew of the predominantly Spanish-speaking electorate, the Board agent conducting the election could not speak or write Spanish and delegated to a Spanish-speaking observer the responsibility for explaining voting procedures to Spanish-speaking voters. The Employer argues that such conduct compromised the Board's neutrality in this election proceeding.

There is well-established precedent that the Board in conducting elections must maintain and protect the integrity and neutrality of its procedures. See, e.g., Glacier Packing Co., 210 NLRB 571 (1974); Kerona Plastics, 196 NLRB 1120 (1972). Election conditions must approach, as nearly as possible, ideal "laboratory" conditions so as to facilitate expression of the uninhibited desires of the employees. General Shoe Corp., 77 NLRB 124, 127 (1948). Thus, the commission of an act by a Board agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election. Glacier Packing, supra.

Contrary to the hearing officer we find that the instant election was not conducted in accord with the above-stated principles. According to testimony credited by the hearing officer, when the first Spanish-speaking employee came to vote, the Board agent merely instructed the Union's observer, Diaz, to "translate the procedure of voting to these employees." The Board agent provided no additional instruction or guidance, and did not participate further in the conduct of the election, except for handing ballots to employees, until the Employer's observer complained. Even after this complaint, the Board agent merely instructed the union observer to repeat the instructions in Spanish. Under these circumstances, we find the atmosphere of impartiality in which the election should have been held was not present.2 The delegation of

² Other cases are not to the contrary. Thus, in Regency Hyatt House, 180 NLRB 489 (1969), the Board affirmed a trial examiner's (now administrative law judge) decision overruling an employer objection alleging misconduct where the Board agent permitted the union observer, without objection from the employer's observer, to give voting directions in Spanish to the only Spanish-speaking employee. The Board found that "[t]here was no proof of electioneering." Id. at 490. Furthermore, this incident involved only one employee and could not have affected the outcome of the election. In Deeco, Inc., 116 NLRB 990 (1956), the employer objected, inter alia, that one of the union's observers talked in Spanish with a number of Spanish-speaking employees. The Regional Director found that a number of voters of Mexican origin, who spoke little or no English, cast challenged ballots; that the Board agent tried to explain the procedure to them in English, and that one of the union's observers spoke briefly to them in a foreign language. The observer claimed that he merely translated the explanation made by the Board agent. The Board found that in the absence of any evidence that the union's observer did anything more than translate the Board agent's instructions, "we are not justified in inferring that during this brief conversation he engaged in electioneering." Id. at 991. There is no evidence in that case, however, that the Board agent systematically turned over the running of the election to the observer. Here, unlike the holdings in Regency Hyatt House and Deeco, we do not address allegations that an observer engaged in electioneering. Rather, our concern is that our elections be conducted in a manner which inspires confidence in the impartiality of the Board and its agents. Moreover, to the extent that the above cases are inconsistent with our decision herein, they are hereby overruled.

an important part of the election process to the Petitioner's observer conveyed the impression that the Petitioner, and not the Board, was responsible for running the election. Such conduct is incompatible with our responsibility for assuring properly conducted elections and, accordingly, we hereby sustain the Employer's objections, and direct that a second election be conducted.³

ORDER

It is hereby ordered that the election conducted on 30 September 1983 is set aside and this proceeding is remanded to the Regional Director for Region 32 for the conduct of a second election.

[Direction of Second Election omitted from publication.]

MEMBER HUNTER, concurring.

I agree with my colleagues that a new election should be directed in this case. However, I believe that in addition the Board should provide guidance to the Regions and the parties on how elections should be conducted when there are possible language issues involved. It is one thing for this Board to invalidate elections because they have not been properly conducted; but in order to assure the proper exercise of the employees' right to vote, and to avoid future problems, the Board has the duty to articulate not just how elections should not be conducted, but also how they should be conducted.

In the instant case, the Board's Regional Office provided both bilingual notices and ballots. Thus it is clear that the Region was on notice that the electorate had, or might have, English language limitations. Despite such notice, the Region did not provide a bilingual Board agent to conduct the election. Rather, the Board agent was forced to rely on an observer to explain voting procedures to foreign-speaking employees. Arguably, the Board agent here could simply have handed the ballots to the prospective voters, and pointed to the printed statements on that ballot or to the choice boxes. Further, the Board agent might have assumed that,

because notices had been posted in two languages, it was unneessary to provide further instructions, and thus the agent could have told the voter to either cast a ballot or leave. Neither option, in my opinion, is compatible with our responsibility for assuring that our elections are conducted properly. Of course, the Board's responsibility extends only to assuring that the balloting procedures are fairly and clearly explained to the employees. The Board is not responsible for voters' inability or unwillingness to follow clear instructions, and the Board would not set aside any election on this last ground. The Board, however, must set aside any election where it has failed to assure the employees a meaningful opportunity to exercise their choice by the Board's failure to ensure that clear directions are communicated to the employees. When employees do not speak English, and when the Board agent cannot speak their language, the Board is unable even to begin to fulfill its statutory duty. Therefore I would hold that where a Regional Office is on notice that a substantial percentage of the electorate do not speak English, the Board must attempt to fulfill its responsibility to protect the integrity of the election process by supplying a Board agent, or Regional Office authorized or otherwise approved interpreter, capable of speaking the language of those employees so far as the particular circumstances permit. Thus, once the Regional Director is apprised by the parties or by circumstances of a potential language problem in an election, it is the Regional Office's duty to ensure to the maximum extent administratively possible that appropriate personnel are present to assist non-English speaking employees. 1 This was not done here, and thus I agree that a new election should be held.

³ In setting aside the election and directing a second election, we find it unnecessary to pass on the Employer's further argument that the Petitioner observer's conduct also violated the standards set out in *Milchem, Inc.*, 170 NLRB 362 (1968).

¹ In several cases the Board has intimated that when the parties are aware of employee language limitations they are responsible for notifying the Board agent prior to the election so that proper arrangements can be made. See, e.g., Magic Pan. Inc. v. NLRB, 627 F.2d 105 (7th Cir. 1980), enfg. 244 NLRB 630 (1979); King's River Pine, 227 NLRB 299 (1976); Alamo Lumber Co., 187 NLRB 384 (1970). Cf. Northwestern Products, 226 NLRB 653 (1976). As indicated above, the cooperation of the parties is vital to the Board's performance of its statutory duties. However, when the Board itself must bear the responsibility for making the proper arrangements to assure that balloting procedures are fully and clearly explained to the electorate.